

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 52 OF 1990

BANK OF MAHARASHTRA

a Banking Corporation
constituted under the Banking
Companies (Acquisition &
Transfer of Undertakings)
Act, 1970 its Head Office at
'Lokmangal', 1051,
Shivajinagar, Pune- 411 005,
Branch Office at L.B.S.
Marg, Kurla (West), Bombay-
400 070.

... Plaintiffs.

V/s.

1. M/s.Aevees Pharmaceuticals,
a Partnership firm having
its office at Block No.F/59,
Konkan Nagar, Lt.P.N.Kotnis
Marg, Mahim, Bombay- 400
016.
2. B. Vasudev R. Hegde.
3. Ajay Vasudev Hegde.
- . both 2 and 3 of Bombay
Indian Inhabitant having
their office at Block
No.F/59, Konkan Nagar,
Lt.P.N.Kotnis Marg, Mahim,
Bombay- 400 016.
4. S.K.Nigudkar of Bombay
Indian Inhabitant residing
at Madhu Milan, Patil Wadi,
Shivaji Park, Bombay- 400
028.
5. V.K.Nigudkar of Bombay
Indian Inhabitant residing
at 40A, Madhavi, Sir
Bhalchandra Road, Dadar,
Bombay- 400 014.

... Defendants.

N.C.Parikh i/b. Mansukhlal Hiralal & Co.
for the plaintiff.

M.A.Dharmaraj for defendant Nos.1 to 3.

O.S.Kutty for defendant No.4.

CORAM: V.C.DAGA, J.

DATED: 27th November 2007.

JUDGMENT :

. The plaintiff- Bank ("the Bank" for short) has filed this suit for the recovery of their outstanding dues; due and recoverable from the defendants in the sum of .under the Cash Credit (Hypothecation) Account and Cash Credit (Bills) Account together with interest, on the sum of Rs.99,138.16 at the rate of 16% per annum with quarterly rests from the date of the suit till payment in full and final.

The Facts :

2. The factual matrix brought on record is that the defendant No.1 is a partnership firm engaged in manufacturing of pharmaceutical products having its factory at 345/A, Wagle Industrial Estate, Thane-400 604 of which defendant Nos.1 and 2 were the partners, who had approached the plaintiff- Bank in

the month of October, 1999 to seek two cash credit facilities viz. (i) Cash Credit Facility against the (Hypothecation of Goods and Raw Materials) to the extent of Rs.25,000/- and (ii) Cash Credit Facility (against the Bills of Defendant No.1) to the extent of Rs.25,000/-.

3. The plaintiffs have stated that the aforesaid facilities were sanctioned in favour of defendant No.1- partnership firm on 31st October, 1984. The defendant Nos.1 and 2 in the capacity of partners of defendant No.1, *inter alia*; executed various loan documents in respect of the aforesaid cash credit facilities and the said documents were renewed by them from time to time. Last of such renewal, according to the plaintiffs, was on 17th October, 1986.

4. The plaintiff- Bank has further stated that so far as cash credit facility against bills is concerned, the same was secured by executing loan documents in the nature of demand promissory note, letter of continuity and the said finance facility was actually availed by defendant No.1- partnership firm.

5. The plaintiff further states that the

aforesaid facilities were guarantied by defendant Nos.4 and 5. Defendant No.5 left for heavenly abode during the pendency of this suit. His heirs/ legal representatives were not brought on record. Therefore, suit stood abated against defendant No.5.

6. The plaintiff has also stated that the cash credit loan account of defendant No.1 had become irregular. Consequently, they were called upon to pay outstanding dues by registered letters dated 5th October, 1989 which were sent by R.P.A.D. and the same were received by the defendants, the acknowledgements thereof are produced on record. In spite of receipt of notice, defendants failed to discharge their legal liabilities. With the aforesaid backdrop, the plaintiff- Bank has filed present suit.

7. On being summoned, defendant Nos.1, 2 and 3 appeared and filed their joint written statement contending therein that suit is barred by limitation. That they did not acknowledge their liability and that the letter of acknowledgment on 17th October, 1986 is not legal and valid. They also disputed correctness of the account maintained by the plaintiff- Bank in respect of cash credit facilities and went on to plead that blank forms of

loan documents were executed by them in favour of the Bank, as such suit is not maintainable on such documents and liable to be dismissed.

8. The defendant No.4 has also filed his written statement denying his liability and contending that the Bank has not taken any steps to mitigate the liability suffered by defendant No.4-guarantor. Defendant No.4 has also denied execution of guarantee letters/documents and receipt of notice of demand alleged to have been issued by the plaintiff- Bank.

Issues for Determination :

9. Considering rival pleadings, issues were framed by this Court vide order dated 3rd September, 2007. By subsequent order dated 19th November, 2007, issue No.(i) came to be modified. The final issues framed read as under:

ISSUES	FINDINGS
(i) Whether the plaintiff proves that the claim made in the suit is within Limitation?	Yes.
(ii) Whether the plaintiff proves that they are entitled to recover the suit claim or any part thereof, from defendant no.4?	Yes.

- (iii) Whether the plaintiff proves that the defendant no.4 has executed a valid Guarantee Deed dated 17/10/1986 guaranteeing the repayment of Rs.47,936=86 Ps. as alleged in para 9 of the plaint? Yes.
- (iv) Whether defendant no.4 proves that the renewal of credit facility as mentioned in para 14 of the plaint is without the consent of defendant no.4? No.
- (v) Whether the defendant no.4 proves that because of the inactions and negligent attitude of the plaintiff, the defendant no.4 is not liable to pay anything to the plaintiff? No.
- (vi) As to what orders or decree?" As per the final order

10. After framing of issues, the plaintiff- Bank has filed affidavits in lieu of evidence of one Mr.Prakash Kaluram Aswale, Branch Manager with one more witness Mr.Damodar Ramchandra Sonawane. The plaintiff- Bank has also filed original documents numbering 25 vide lists of documents (Exh.A and B).

11. The defendant No.1 has admitted loan documents executed on 31st October, 1984 to secure cash credit facility in the sum of Rs.25,000/- . Consequently, the loan documents such as letter of request, deed of hypothecation, letter of authority,

promissory note and letter of continuity were marked as Exh.A-1 to A-5 on admission.

12. The plaintiff- Bank examined two witnesses whose affidavits were filed by way of examination-in-chief. They were cross-examined by defendant Nos.1 to 4. The witnesses examined by the plaintiff- Bank have proved loan documents executed by defendant Nos.2 and 3 on 31st October, 1984 and 17th October, 1986 So far as Cash Credit (Hypothecation) Facility is concerned, those documents were proved during the course of evidence. The plaintiff- Bank also proved letter of guarantee executed by defendant Nos.4 and 5; whereunder both defendant Nos.4 and 5- guarantors have guaranteed repayment of cash credit loan facilities availed by the borrowers- defendant Nos.1 to 3.

13. The plaintiff- Bank has also proved loan documents executed by defendant Nos.1 to 3 to secure Cash Credit (Bills) Facility; such as demand promissory note (Exh.P-20), letter of continuity (Exh.P-21), letter of guarantee executed by defendant Nos.4 and 5 (Exh.P-22).

14. The plaintiff has also proved letter of demand by producing copies of the notices issued by

the plaintiff- Bank through their Advocates and Solicitors dated 5th October, 1989 (Exh.P-23 and P-24). The Bank has also proved the account opened by defendant Nos.1 and 2 vide Account Opening Form dated 31st August, 1984 (Exh.P-12) and the transactions through extracts of accounts duly certified under Bankers Books of Evidence Act showing borrowings made by defendant Nos.1 to 3 and the repayments made by them from time to time (Exh.25).

15. The plaintiff- Bank has also produced and proved letter of confirmation dated 13th October, 1989; whereby the defendants have admitted to have executed various loan documents in favour of the plaintiff- Bank. The Bank has also produced original postal receipts evidencing dispatch of demand notices by R.P.A.D. (Exh.P-6, P-7 and P-8) and also produced original acknowledgments showing receipt of R.P.A.D. notices by the noticees (Exh.P-9 to P-11).

16. None of the defendants have entered in the witness box. They did not examine anybody on their behalf. With the aforesaid pleadings and evidence the above suit was heard and decreed for the reasons to be recorded. Accordingly, the reasons are being

recorded.

Consideration and Findings :

As to Issue Nos.2 and 3 :

17. These issues revolve around the defence raised by defendant No.4, who challenged the execution of deeds of guarantee dated 17th October, 1986. The plaintiff's witness- Mr.Damodar (P.W.2) has deposed that defendant Nos.4 and 5 had executed deeds of guarantee dated 17th October, 1986 in his presence. He further deposed that these documents were filled in by the then Branch Manager, who is no more alive. He has identified signatures of defendant Nos.4 and 5 stating that he is acquainted with their signatures. Secondly, these guarantee deeds were taken as proved and marked as Exh.P-17 and P.22. It is, thus, held that defendant No.4 did execute valid bank guarantee letter in favour of the plaintiff- Bank. The plaintiff- Bank has also proved the demands made against defendant Nos.4 and 5- guarantors and also established that R.P.A.D. notices were sent to them under Exh.P-6 and P-7 and the same were received by them under Exh.P-10 and P-11.

18. The Defendant No.4 did not enter in the

witness box to prove that he did not receive demand notice but he received something else in the R.P.A.D. cover as alleged by him. In absence of any evidence by defendant No.4, the evidence adduced by plaintiff, which remained unshaken during cross-examination, has got to be accepted. The terms of guarantee letter clearly stipulate that defendant Nos.4 and 5 waived all their rights available to them under sections 133, 134, 135, 139 and 141 of the Contract Act. They have also stated that they will not be entitled to the benefit of subrogation to the securities until all monies due to the Bank secured by such securities are fully repaid. They also held themselves liable to indemnify the Bank and to pay entire dues of the Bank.

19. The plaintiff- Bank has also filed extracts of accounts duly certified under the Bankers Books Evidence Act and has proved the same during the course of oral evidence. It came to be marked as Exh.P-25, which shows outstanding dues, due and recoverable from the defendants in the sum of Rs.51,025.66.

20. Since defendant No.5 is dead and suit has abated against him. The defendant No.4 is liable to

pay the suit claim.

As to Issue Nos.1, 4 and 5 :

21. These issues revolve around the defence set up by the guarantors contending that the suit is barred by limitation and that the renewal of the bank guarantee was without their consent and that inaction and negligence on the part of the Bank defendant Nos.4 and 5 are not liable to pay anything to the Bank.

22. So far as question of limitation is concerned, in case of continuing bank guarantee the limitation against the guarantor starts running from the date of default as per the law laid down by the Apex Court in the case of **Margaret Lalita v. Indo Commercial Bank Ltd.**, AIR 1979 SC 102. The guarantee in question is a continuing guarantee.

23. The demand made is of 5th October, 1989 against the guarantors which they failed to meet. The suit came to be filed on 16th October, 1989. The suit is, thus, well within limitation. The second guarantee letter executed by defendant No.4 is dated 17th October, 1986. Under these circumstances, even from the date of execution of

the guarantee letters suit is within period of limitation which is of three years. Issue No.1 is answered against the defendants holding that the suit claim is not barred by limitation.

24. So far as renewal of loan documents is concerned, second renewal of documents itself has been executed by the borrowers. This renewal will also bind the guarantors. The guarantors have waived all their rights which they had under the Contract Act as stated in the earlier paras. It was not necessary to have prior consent of the guarantors to renew the financial facilities or loan documents. Even otherwise, guarantee letters have also been signed by the guarantors at the time of renewal of loan facilities by the borrowers. Thus, issue No.1 has to be answered against defendant No.4.

25. The defendant No.4 did not enter in the witness box to demonstrate inaction and negligence on the part of the plaintiff- Bank. The Privy Council in the case of **Gurbaksh Singh v. Gurdial Singh**, 29 Bom L R 1392, has held that, -

" It is the bounden duty of a party, personally knowing the whole circumstance of the case, to give evidence on his own behalf and to submit to cross examination. His

non-appearance as a witness would be the strongest possible circumstance going to discredit the truth of his case."

The Privy Council has also taken a similar view in the case of **Pirgonda v. Vishwanath**, AIR 1956 Bom. 251. The following is the material head-note:

" Normally a party to the suit is expected to step into the witness box in support of his own case and if a party does not appear in the witness-box it would be open to the trial Court to draw an inference against him. If a party fails to appear in the witness box, it should normally not be open to his opponent to compel his presence by the issue of a witness summons....."

Thus, defence put up by defendant No.4 cannot be accepted. Under these circumstances, defendant No.4 as a guarantor cannot escape his liability.

26. The defendant Nos.2 and 3 are concerned, in their written statement they did not deny execution of any of the documents. The basic documents executed by them at the time of borrowing loan have been admitted by them. The extract of account are also proved by the plaintiff- Bank. They were also referred to by the counsel for defendant Nos.1 to 3 during the course of cross-examination. Consequently, in view of law laid down by the Apex Court in the case of **Ram Janki Devi v. M/s.Juggilal**

Kamlapat, AIR 1971 SC 2551, the said documents stand proved.

27. Apart from the above, defendant Nos.1 to 3 cannot be allowed to deny their liability since they did not enter in the witness box. They did not raise any defence. Even otherwise, it was open for them to enter in the witness box and dispute their liability. Consequently, adverse inference can be drawn against the defendants in view of Apex Court judgment in **Ram Janki Devi** (supra).

28. Apart from the above, as per the law laid down by the Apex Court in the case of **Hiralal v. Badkulal**, AIR 1953 SC 225, it was obligatory on the part of defendant Nos.1 to 3 to produce their account books and prove them to establish that they did not borrow money or that they did not renew loan facilities or that fresh financial facilities were sanctioned to them by the Bank. No such evidence was tendered by them.

29. At this juncture, it would be relevant to refer to the observations of the Apex Court made in the case of **Hiralal v. Badkulal** (supra) reading as under:

"Suit for recovery of amount due on basis of adjustment of accounts signed by defendant. Defendant denying correctness of amount found due. Defendant who is in possession of account books kept by him and from which the balance could be ascertained should produce them before Court. He cannot be heard to say, relying upon the abstract doctrine of onus of proof, that it was no part of his duty to produce them unless he was called upon to do so."

30. In the above view of the matter, suit filed by the plaintiff- Bank is liable to be decreed in toto. Hence the following order:

ORDER

(i) The suit is decreed in terms of the prayer clauses incorporated in the plaint.

(ii) The defendants do jointly and severally pay Rs.99,138.16 with interest thereon from the date of the suit at the rate of 12% per annum till realisation of decretal amount in full and final with costs.

(iii) Decree be drawn in terms of this

order.

(V.C.DAGA, J.)